Supreme Court, U.S.
FILED

01-77 JUL 11 2001

No. 01-

IN THE

Supreme Court of the United States

MARY ANN HETREED,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

1. Whether an employee who has been subjected to an unwelcome sexual relationship with an officer of the employer in exchange for job benefits and under threat of having job benefits withheld, has suffered an adverse tangible employment action.

2. Whether an employer can be held strictly liable for actions of an officer who demanded submission to an unwanted sexual relationship with a subordinate in exchange for job benefits (including approval of salary increases, bonuses, promotions, and favorable performance reviews).

3. Whether federal law provides that an award of costs is part of the judgment so that a separate notice of appeal is not required.

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Petitioner, Mary Ann Hetreed, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not published, but can be found at 2001 WL 427785. (Appendix A). The opinion of the district court is not published, but can be found at 1999 WL 311728. (Appendix B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ('Court of Appeals') was entered on April 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Hetreed filed her Complaint alleging sexual harassment by an officer of Defendant, Allstate Insurance Company, based upon submission to an unwelcome sexual relationship. Hetreed presented evidence that she was threatened with having job benefits withheld or promised favorable job benefits in exchange for engaging in the nonconsensual sexual relationship with Defendant's officer.

The trial court granted summary judgment in favor of Allstate on the sexual harassment claim, holding that Allstate was entitled to the *Ellerth/Faragher* affirmative defense as a matter of law. The trial court first held that Allstate was

entitled to use of the affirmative defense because Hetreed had not suffered any adverse tangible employment action. The trial court then held that Allstate prevailed on the affirmative defense as a matter of law, despite conflicting evidence on material elements of the affirmative defense.

The Seventh Circuit Court of Appeals affirmed the entry of summary judgment and held that an employee who submits to an unwanted sexual relationship with a supervisor in exchange for job benefits has not suffered any tangible employment action.

Petitioner presented evidence that she was coerced into unwelcome, nonconsensual sexual conduct with her superior McGann as an imposed requirement of her employment. Part of her required employment became the performance of oral sex by and upon her superior, and the submission to vaginal and anal intercourse by him. This coerced sex was abusive and demeaning to Plaintiff. In return, Plaintiff received reasonably appropriate future evaluations, compensation (including bonuses and pay raises), responsibilities, and other job related treatment. In this case the tangible employment action against Plaintiff was her being subjected to sexual acts with her superior as a condition of employment. Plaintiff submitted to unwelcome demands for sex by Defendant's officer because of his authority over her promotions, bonuses, salary, and performance reviews, and the terms and conditions of employment. The acts of the officer of Defendant significantly altered the terms or conditions of Plaintiff's employment.

Two of Petitioner's claims of retaliation went to trial. The trial court entered judgment on the jury verdict in favor of Defendant on February 29, 2000, and awarded costs to Allstate. (C. 198, 214).

Allstate employed approximately 50,000 employees and the harassing officer, George McGann, was one of the highest ranking officers at the time the harassment of Mary Ann Hetreed took place. McGann had supervisory authority over Plaintiff, including promotions, salaries, bonuses, performance reviews, and other terms and conditions of employment.

Plaintiff, Mary Ann Hetreed, was an audit manager and an outstanding employee of Defendant Allstate Insurance Company until the termination of her employment on March 7, 1997.

The approximately sixteen sexual acts that took place over four years were not consensual, and even in the words of McGann, were not an affair. There is no evidence presented other than that the sexual advances by McGann were unwelcome by Hetreed. Indeed, McGann first denied there was any sexual relationship.

McGann later admitted to most of the sixteen incidents over the four years, but claimed that it was Plaintiff who harassed him.

Defendant has not presented any evidence that the sex was mutual and consensual. Indeed, since the principals to the sex (McGann and Hetreed) both assert the sex was non-consensual, it is only Allstate that somehow claims to know more than they. The trial court judge decided the controverted facts on the harassment theory, siding with Allstate, when this was clearly a disputed matter fact for a jury to decide.

The trial judge effectively gutted the heart of Plaintiff's allegations, leaving her with two isolated retaliation matters for trial, so Plaintiff could not have her day in court to present the pattern of harassment and retaliation.

By the time of trial the handwriting was on the wall. Plaintiff was prejudiced in having to proceed with two isolated incidents of retaliation, which, out of the full context of the series of events, made Plaintiff's case impossible to prove. It was an impossible task for the jury to determine the impact of two isolated issues of retaliation.

There is no evidence in this case of consensual sex. Plaintiff suffered debilitating illness from the harassment which rendered her permanently disabled and unable to work. Yet Defendant argues the sex was consensual.

There were many factual matters more appropriate for a jury determination on the harassment claim, including: the alleged acts of discrimination did not constitute a consensual relationship; the evidence indicates there was a series of coerced events spread over four years; and Plaintiff was treated more harshly than Defendant's officer, McGann, who received his special retiree benefits worth millions of dollars.

Summary judgment should not have been granted on the issue whether Plaintiff's actions were reasonable in not reporting the harassment in the face of threats of retaliation. The situation in which Defendant's officer placed Plaintiff is not the type of thing one tells anyone if it is coerced. Plaintiff told no one for four years out of shame and humiliation that the harassment was happening to her. And there was evidence that when Plaintiff did attempt to approach those who should have been in position to help, their reaction was one of indifference, ineptitude, or worse.

Plaintiff did complain of the inappropriate behavior by McGann. And Plaintiff witnessed the ineffectiveness of Defendant's policy on harassment which had not been followed in her complaint against Williams. It was natural that Plaintiff believed her complaint of harassment by McGann would not be effective. When she finally did complain, McGann was not fired, even though he still received the special retirement benefits worth millions of dollars, and he only received a relative slap on the wrist by the withholding of a modest bonus. When Plaintiff finally did complain of McGann she was faced with the same ineffective response and retaliation she had witnessed.

These were sensible factual inferences a jury is so well suited to make.

At the time the harassment began, Plaintiff was four employment levels below McGann. He was the boss of the boss of Plaintiff's boss. McGann was one of most senior officers of Allstate. Plaintiff was not in a situation like one complaining against a fellow employee or an immediate supervisor. Complaining against McGann was effectively complaining to the top of the corporate pyramid for Plaintiff. Plaintiff was warned by McGann not to report the harassment to anyone and specifically not to another officer, McGann's boss, Norb Florek, Senior Vice President.

When Plaintiff did complain to her supervisor, Bahrman, of harassment by another individual, Williams, her supervisor kept it hidden from Human Resources and Corporate Security and instead reported it to McGann.

These facts presented the legitimate inference: Plaintiff's fear of retaliation for reporting the harassment was reasonable, and was not merely some generalized fear.

Who could Plaintiff complain to about McGann? A jury could infer that Plaintiff's complaint against McGann would not be adequately addressed. And the facts demonstrate that it was not. When Plaintiff did complain earlier nothing was done. When she finally complained against McGann, there was an ineffective response, and a pattern of retaliation. Plaintiff complained in September 1995 while McGann was still an employee. Defendant allowed McGann to retire November 30, 1995 with several million dollars in benefits under the Special Retirement Offer. It was not until outside attorneys became involved in the investigation in February, 1996 that McGann was 'punished' by the withholding of a relatively insignificant bonus. Defendant's response was ineffective just as Plaintiff anticipated. Summary judgment was inappropriate, and a jury should be allowed to decide the disputed facts presented on this issue.

Marge Kellen (Vice President of Tax) made phone calls to Plaintiff after McGann left Allstate, telling Plaintiff to meet McGann at a bar, and to come alone. Defendant knew that Marge Kellen, other officers, and managers were aware of or suspected the sexual harassment. Rachel Morrison was told by Plaintiff of the sexual incidents, and Morrison testified she did not get the impression Plaintiff wanted nor that Plaintiff welcomed a sexual relationship with McGann. No action was taken in regard to the failure by Morrison to report the sexual harassment. Also, Bahrman and another manager, Sichz, showed their knowledge and suspicion of the sexual harassment, including when they questioned only Plaintiff about McGann's whereabouts when he missed a Sears Corporation meeting the morning after one of the sexual incidents. Bahrman and Sichz cannot now claim they thought the relationship was consensual after Plaintiff made it clear to both of them repeatedly that McGann's behavior

both in the office and at outside company sponsored events was inappropriate and offensive. Indeed, because McGann testified that his sexual relationship with Plaintiff was not an affair, summary judgment on the issue was especially inappropriate.

REASONS FOR GRANTING THE WRIT

I. The Petition should be granted because the lower court committed serious legal error in holding that an employee who has been subjected to an unwelcome sexual relationship with an officer of the employer in exchange for job benefits and under threat of having job benefits withheld, has not suffered an adverse tangible employment action.

The lower courts made an improper application of the *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) and *Burlington v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) decisions. The law is clear both before and after *Faragher* and *Ellerth* that an employer is strictly liable when a high ranking officer subjects an employee to an unwanted sexual relationship in exchange for favorable employment benefits. Such a change in the terms and conditions of employment causes that employee to suffer an adverse tangible employment action. Allstate should not benefit from the affirmative defense and should be held strictly liable for the actions of its officer.

In the alternative, if the affirmative defense is available to Defendant, the evidence clearly indicates that there are disputed issues of material fact. There was evidence that Allstate failed to exercise reasonable care to prevent and correct sexual harassment. There was evidence that Hetreed

attempted to take advantage of preventive and corrective opportunities and was rebuffed. There was also evidence that the preventive and corrective opportunities were ineffective.

The evidence is also clear that there was a pattern of retaliation against Plaintiff for her claim of sexual harassment.

An unwelcome sexual relationship with a subordinate by a corporate officer in exchange for favorable work benefits is a tangible employment action as a result of the sexual harassment.

This strict liability of the employer for the actions of a corporate officer does not depend on any artificial label, but depends on recognition that an unwelcome sexual relationship to receive or retain employment benefits constitutes an adverse employment action.

This is consistent with this Court's holdings in Faragher and Ellerth. The detriment to the subordinate employee caused by the officer of the employer is controlling on the issue of vicarious liability.

In this case a tangible employment action was taken against the employee. Plaintiff received favorable tangible employment benefits because of the threat by the offending officer to withhold such employment benefits. The offending officer had the power and authority to favorably affect Plaintiff's employment benefits and could extort an unwelcome sexual relationship, just as the offending officer had the power and authority to adversely affect a subordinate's employment benefits if the unwanted sexual advances were refused.

II. The Petition should be granted because the lower court committed serious legal error in holding that an employer cannot be held strictly liable for actions of an officer who demanded submission to an unwanted sexual relationship with a subordinate in exchange for job benefits (including approval of salary increases, bonuses, promotions, and favorable performance reviews).

Plaintiff produced clear evidence of sexual harassment by Defendant's high ranking officer. Plaintiff was subjected to sexual harassment and denied the tangible job benefit of being free from sexual harassment, and of not being subjected to harassment as a term or condition of employment. The very nature of submission sexual harassment is the extraction of sexual favors for a job benefit or a threat to withhold a job benefit if the employee does not submit.

Summary judgment was improperly granted on the issue of sexual harassment because of the misapplication of *Faragher* and *Ellerth*, and in some instances the trial court gave inferences favorable to Defendant where there were genuine issues of material fact. The trial court ignored evidence favorable to Plaintiff, construed evidence in Defendant's favor, and drew inferences from the evidence favorable to Defendant. There are clearly genuine issues of material fact which precluded summary judgment in favor of Defendant.

In *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) the Court held that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim. *Faragher* involved a hostile work environment situation.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

Faragher did not change the previous rule of strict employer liability for quid pro quo sexual harassment by a supervisor, and cited *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("When a supervisor requires sexual favors as a quid pro quo for job benefits, the supervisor, by definition, acts as the company"); *see also* Lindemann & Grossman 776 (noting that courts hold employers "automatically liable" in quid pro quo cases because the "supervisor's actions, in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer").

Burlington v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998) involved a case in which an employee refused the unwelcome and threatening sexual advances of a supervisor, yet suffered no adverse, tangible job consequences. The Court held in such a case, for the employee to recover against the employer there must be a showing that the employer was negligent or otherwise at fault for the supervisor's actions.

The Court in *Burlington v. Ellerth* stated,

> In *Meritor*, the terms served a specific and limited purpose. There we considered whether the conduct in question constituted discrimination in the terms or conditions of employment in violation of Title VII. We assumed, and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit.

See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, at 77(1986) (Marshall, J., concurring in judgment) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates").

In the present case the tangible employment action against Plaintiff was being subjected to sexual acts with a superior officer as a condition of employment. Plaintiff submitted to unwelcome demands for sex by Defendant's officer because of his authority over her raises, promotions, bonuses, and terms and conditions of employment. The acts of the officer of Defendant significantly altered the terms or conditions of Plaintiff's employment.

The affirmative defense is not available when the supervisor's harassment culminates in a tangible employment action.

In its analysis of *Faragher* and *Ellerth*, the EEOC recognized that a supervisor demanding sex for a favorable employment action constitutes an adverse employment

action, the same as a refusal followed by an unfavorable employment action. The analysis in the EEOC Enforcement Guideline No. 915.002 (June 18, 1999), stated:

> If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. [*See Nichols v. Frank*, 42 F.3d 503, 512-13 (9th Cir. 1994) (employer vicariously liable where its supervisor granted plaintiff's leave requests based on her submission to sexual conduct), cited in *Faragher*, 118 S. Ct. at 2285.] Such harassment previously would have been characterized as "quid pro quo." It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employee's rejection of unwelcome sexual demands, but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands. The Commission rejects such an analysis. In both those situations the supervisor undertakes a tangible employment action on a discriminatory basis. The Supreme Court stated that there must be a significant *change* in employment status; it did not require that the change be adverse in order to qualify as tangible. [*See Ellerth*, 118 S. Ct. at 2268 and *Faragher*, 118 S. Ct. at 2284 (listed examples of tangible

> employment actions that included both positive and negative job decisions: hiring *and* firing; promotion *and* failure to promote)].

The EEOC position is in conflict with the holding of the Seventh Circuit Court of Appeals. The EEOC stated its position that the *Ellerth/Faragher* affirmative defense is not available in cases in which an employee submits to a supervisor's sexual demands in exchange for tangible job benefits.

This position is consistent with the balance struck by this Court in *Ellerth* and *Faragher*. The employee who submits to the advances of an officer to retain employment benefits should not be in a worse position that the employee who refuses sexual advances and suffers a loss of an employment benefit. Both have suffered an adverse employment action. This supervisor-subordinate power differential is properly observed by imposing strict liability on the employer.

Submitting to an unwanted sexual relationship to retain employment benefits constitutes a significant change in employment status.

The lower courts misinterpreted the cases of *Faragher v. Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries Inc. v. Ellerth*, 118 S. Ct. 2257 (1998). In *Ellerth*, the Court noted that the "unfulfilled quid pro quo" (118 S. Ct. at 2263) was really a hostile environment case. (118 S. Ct. at 2265). The quoted predicate to the new affirmative defense set out in each case reads: "When no tangible employment action is taken . . ." (*Faragher*, 118 S. Ct. at 2270, and *Ellerth*, 118 S. Ct. at 2292-93). The

affirmative defense cannot be intended to apply in a case of submission to sexual harassment, such as the instant case.

The Court in *Faragher* noted that the supervisors' conduct was discriminatory harassment sufficiently serious to alter the conditions of Faragher's employment and constitute an abusive working environment. Certainly the facts in the present case demonstrate that the high ranking officer who coerced sexual activity in exchange for job benefits engaged in harassment sufficiently serious to alter the conditions of Plaintiff's employment.

In this case the tangible employment action against Plaintiff was her being subjected to sexual acts with her superior as a condition of employment. Plaintiff submitted to unwelcome demands for sex by Defendant's officer because of his authority over her raises, promotions, bonuses, and terms and conditions of employment. The acts of the officer of Defendant significantly altered the terms or conditions of Plaintiff's employment.

Alternatively, if the new defense applies to a submission to unwelcome sex case like Plaintiff's, there are certainly genuine issues of material fact about both elements of the defense.

As to the first element, whether "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," Plaintiff presented evidence that high-ranking agents of Allstate knew of the sexual harassment (including McGann himself) and did nothing to stop it for four years. Certainly, the conflicting views of the effectiveness and the promptness of Allstate's response or lack of response to the harassment of Plaintiff constitute

factual issues for a jury. Indeed, it seems amazing, that while Plaintiff asserts she was sexually harassed, and while McGann asserts he was sexually harassed by the Plaintiff, Allstate is still contending that Plaintiff and McGann had "a consensual sexual relationship" (Defendant's Memorandum of Law In Support of Its Motion for Summary Judgment, page 3). There seems to be a very basic factual dispute on a most important aspect of the first element of the affirmative defense.

As to the second element of the defense, whether "the Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," Plaintiff contends that it was not unreasonable to come forward with her complaint of sexual harassment at the time she did. McGann remained her superior at Allstate until January of 1995 and remained a threat to Plaintiff's employment due to his influence with other officers beyond that time. Although McGann left the Allstate premises in May of 1995, he did not officially retire until November 30, 1995. Plaintiff had good reason to delay her complaint of sexual harassment until September of 1995. Again, the reasonableness of Plaintiff's conduct presents the classic factual issues for a jury to decide.

Also there was evidence Plaintiff witnessed retaliation against other employees who complained of discrimination or who challenged officers, and when Plaintiff did complain of sexual harassment by Dave Williams, Defendant's officers violated company policy in handling her complaint.

McGann confirmed through his testimony, and documents showed, that McGann had final responsibility and authority for approval of performance reviews when Plaintiff

was a non-manager, and he continued in the chain of supervisory authority through January of 1995. Also, McGann told Plaintiff of raises, and bonuses before official announcements by Bahrman. McGann said to Plaintiff that is was time to, "up the ante", meaning more employment benefits required more sexual harassment.

III. The Petition should be granted because the lower court committed serious legal error in holding that federal law does not provides that an award of costs is part of the judgment so that a separate notice of appeal is required.

The Court of Appeals incorrectly held that it did not have jurisdiction of the order awarding costs. The provision cited to the Court of Appeals by Defendant, 28 U.S.C. § 2412 is inapplicable as it applies to cases in which the United States is a party.

Under the relevant statute, an award of costs is part of underlying judgment. Title 28 U.S.C. § 1920 on Taxation of Costs provides:

> . . . A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Also, Federal Rule of Appellate Procedure, Rule 4 does not require an amended notice of appeal for an order awarding costs. The rule spells out the specific types of motions which require an amended notice of appeal, including: judgment under Rule 50(b); amendment under Rule 52(b); for attorney's fees under Rule 54; to alter or amend the judgment, or for a new trial under Rule 59; or for relief under

Rule 60. The rule on statutory construction, *expressio unius est exlusio alterius*, applies. Where certain things are expressed in the law, an intention to exclude all others from its operation may be inferred. *See* Blacks Law Dictionary. The fact that an order for costs was not included in the list of rulings which require an amended notice of appeal supports the statutory provision that such an order is part of the underlying judgment and included in any appeal of that judgment.

This Court in *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 367 (7th Cir. 1993) held that the pendency of a motion for costs under the rule relating to an offer of judgment did not preclude the filing of a valid notice of appeal. The Court noted that a motion for costs was not a substantive motion for purposes of Federal Rule of Appellate Procedure, Rule 4(a)(4) and Federal Rule of Civil Procedure, Rule 59(e). Thus, no amended notice of appeal is required for an order awarding costs. That award becomes part of the underlying judgment pursuant to statute. The important reason that *Lentomyynti* distinguished an award of costs from a Rule 59 motion is that an amended notice of appeal is required for a Rule 59 motion, and not required for an order allowing costs.

CONCLUSION

This case presents several exceptionally important questions. In light of the conflict between the Seventh Circuit Court of Appeals decision in this case and the position taken by the EEOC in its enforcement guidelines this Court should clarify its holding in *Faragher* and *Ellerth*. It is important that this court clarify whether an employee who submits to an unwelcome sexual relationship in exchange for job benefits or to avoid a job detriment has suffered an adverse employment action.

Accordingly, Petitioner, Mary Ann Hetreed, respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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